No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL.,
Petitioners,

v.

WESLEY P. BERNARD, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

This reply brief is submitted by Petitioners in response to the briefs filed by the Respondents and by the *amici* who also urge affirmance of the judgment of the Court of Appeals.

ARGUMENT

I. Introduction

Respondents' brief contains two dominant themes: (1) the presumed merit of the underlying cause of action; and (2) the danger which this case presumably presents to the continued vitality of the first amendment speech and associational concerns set out in *NAACP v. Button,* 371 U.S. 415 (1963) and *In Re Primus,* 436 U.S. 412 (1978). The first of these themes is, of course, irrelevant to a proper disposition of this Court's limited grant of certiorari.[1] It is also quite unfair to the Petitioners who, at this point, have not yet had the opportunity to present fully their position at the trial level.[2] Like many Title VII actions, the substantive issues in this case are not easy. Indeed, they occupied Gulf and the cognizant federal agencies for over seven years before the filing of this action. At this stage Respondents' lengthy, *ex parte* presentation of the matter is premature and, indeed, renders more difficult the task of focusing on the important issue upon which this Court has granted certiorari.[3]

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1. Respondents, by way of anticipating their argument, dispute the formulation of the question presented by the Petitioners and upon which this Court granted certiorari. *But see* Supreme Court Rule 21.1(a).

2. As Respondents note in their brief, (R. Br. 70) due process of law involves not only the right to proper notice but also the right to be heard. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). *See also Fuentes v. Shevin,* 407 U.S. 67, 80 (1972), quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). Petitioners have not yet had that opportunity to be heard.

3. Respondents' continued unsupported assertions of liability in this case (before any discovery has taken place) (R. Br. 7, 8, 94-96) support Petitioners' position that monitoring orders are necessary. It can only be assumed that Respondents' speech before

Respondents' second major theme, a perceived threat to the continued vitality of *Button* and *In Re Primus* is, we submit, simply not responsive to the question before the Court. In the following paragraphs, we shall set forth, albeit briefly, our reasons for submitting that these two cases ought not control the Court's disposition of this case.

II. The Special Responsibility of the Litigator

The fundamental flaw in the Respondents' characterization of this case is their failure to recognize fully and to deal frankly with the particular demands of class action litigation. Certainly all lawyers are, in all aspects of their professional work, "officers of the courts." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). However, when they appear as counsel in a particular case, they have a special "fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring). This special duty to the court during ongoing litigation falls on all attorneys engaged in litigation irrespective of their clients, their fee arrangements or the nature of the arguments which they are tendering to the court.[4]

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the assembled potential class members was equally zealous and optimistic about their chances of success on the merits and their ability to recover substantial damages against Petitioners. The district court's entry of the order was justified since, as one court found in applying the *Manual's* requirements: "Plaintiffs' counsel's enthusiasm has led them to make optimistic statements about yet unresolved legal and factual issues in this case which I believe are not justified and much of the material filed in the court has been studded with overheated rhetoric." *Payton v. Abbott Labs.*, 86 F.R.D. 351, 352 (D. Mass. 1980).

4. While this Court recognized in *NAACP v. Button*, 371 U.S. 415 (1963) that the NAACP Legal Defense Fund has "a corporate

Consequently, it simply is not correct to assert, as Respondents do (R. Br. 43), that the relationship between the attorneys of record in this litigation and the potential class members was the same as the relationship between the attorneys and possible plaintiffs in *Button* and *Primus*. As we noted in our opening brief (P. Br. 16), the district court and those appearing before it, have a special obligation to assure that members of the potential class receive complete and accurate information so that they may exercise their rights in an informed manner and in a manner compatible with the purpose of class actions.

III. The Order Under Review

With respect to the order under review,[5] Respondents' reliance (R. Br. 33) on the general proposition that

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reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation" *id.* at 422, it has never intimated that different rules of litigation conduct ought to apply to this organization or any other group. Respondents forcefully argue that the role of the Legal Defense Fund in this litigation is distinguishable from that of counsel who use the legal process for "purely private gain," (R. Br. 37), but, in fact, of the attorneys who appeared and addressed the assembled potential class members only one, Ulysses Gene Thibodeaux, was, at that time, a staff attorney with the Legal Defense Fund. The other two attorneys, Ms. Stella M. Morrison and Mr. Charles E. Cotton were private practitioners who would benefit personally and financially from any award of attorneys fees. (See Ms. Morrison's affidavit where she states an award of attorneys fees would be accepted by her; but she does not indicate whether the fee would be turned over to the Legal Defense Fund. J.A. 118-20). Ms. Morrison also stated in her affidavit she has retainer agreements with 34 members of the potential class; but she failed to state how each of these arrangements was solicited. (J.A. 118-20). Mr. Cotton, who also attended the meeting, neither submitted an affidavit nor explained his economic relationship with the plaintiffs.

5. Respondents' claim that the validity of three separate orders is before the Court. The temporary order issued by Judge Steger on May 28, 1976, expired by virtue of its own terms upon Judge

"broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms," *United Mineworkers v. Illinois Bar Association*, 389 U.S. 217, 222 (1967), does little to resolve the concrete problem before this Court. The district court here was hardly dealing with a "very distant possibility of harm." *United Mineworkers, supra* at 223. Rather, the trial judge was dealing with a type of proceeding and a stage in the litigation process known to cause serious problems of fairness. He could draw not only upon the collective wisdom and experience of his fellow judges who, in drafting the *Manual for Complex Litigation*,[6] reprinted in 1 (Pt. 2) J. MOORE FEDERAL PRACTICE Pt. II, § 1.41 (2d ed. 1980) (hereinafter cited as *Manual*) had noted the particular danger of confusion and unfairness at

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Fisher's entertainment of Petitioner's motion to modify, filed on June 8, 1976. (J.A. 45). Significantly, during the pendency of that interim order, Respondents did not seek modification of the order and they did not demonstrate that during that short period, they were harmed in any way.

Respondents' motion for permission to communicate with members of the proposed class, filed July 6, 1976, was made pursuant to the terms of Judge Fisher's order of June 22, 1976 (J.A. 130), and is therefore, merely an application of that order. As Petitioners note, p. 11, *infra*, this motion of Respondents is a good example of the sort of abuse which the *Manual for Complex Litigation* model order was intended to prevent.

6. "The *Manual* is designed to provide for the fair, firm, and efficient judicial control of complex litigation. (Citation omitted). A district judge is not left in the position of a captain whose ship, lacking a rudder and throttle, proceeds at its own speed in its own direction. Instead, the *Manual* encourages and provides suggestions as to how the district judge should exercise control over the parties and give the case direction." *In Re Financial Securities Litigation*, 609 F.2d 411, 428 (9th Cir. 1979), *cert. denied sub nom., Gant v. Union Bank*, 446 U.S. 929 (1980).

at this stage of class action proceedings,[7] but also upon the situation before him.[8]

Respondents and *amici* state the district court must make specific and formal findings before entering the monitoring order pursuant to Rule 23, Fed. R. Civ. P. (See R. Br. i Questions Presented, 22, 46-47 and Gov. Br. 16). But the Federal Rules of Civil Procedure do not, of course, require that such specific findings be made. *See* Fed. R. Civ. P. 52(a).[9] Moreover, in *Arizona v. Wash-*

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7. The Government's amicus brief notes that "[t]his section of the *Manual* [1.41] is presently undergoing revision" (Gov. Br. 6 n.5). The implication is that the provision in question will no longer be kept in its present form. However, it should be noted that the *entire Manual* is being reexamined. At least the most recent draft of the proposed revised *Manual* retained the provision in question. Certainly, it is even more relevant that, in the *Manual's* most recent official update, the Board of Editors, despite the criticism of this section, retained the section noting "[f]urther, experience continues to teach that it is dangerous to await the occurrence of an abuse before trying to correct it." *Manual* (2d ed. Supp. 1980-81)

8. The situation, as the record shows, was that Respondents' attorneys appeared before about 75 potential class members four days after commencing this action and discussed the issues, the type of relief requested and explained various problems. (J.A. 116, 118). The attorneys, as reported to Gulf, also advised the gathering not to sign the conciliation releases and to return the conciliation checks since by prosecuting this action Respondents' attorneys could recover at least double the amount paid under the conciliation agreement. (J.A. 22-24). Therefore, even if this Court would hold that a district judge may not enter an order of this type on the basis of the acknowledged difficulties which other judges have encountered in this area, it must still confront the fact that this case involves a significantly greater demonstration of actual danger to the possible class members. Thus, this case does not raise the question of whether a district court may enter the model order absent a demonstration of abuse to the rights of potential class members.

9. Even where findings of fact and conclusions of law are required under Rule 52(a), the cases state that their entry is not necessary where the record supports the judgment. *Mallory v. Citizens Utilities Co.*, 342 F.2d 796, 792 (2d Cir. 1965); *Huard-*

ington, 434 U.S. 497, 516-517 (1978), this Court noted that, with respect to the fifth amendment right of double jeopardy:

> Since the record provides sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally defective.
>
> Review of any trial court decision is, of course, facilitated by findings and by an explanation of the reasons supporting the decision. No matter how desirable such procedural assistance may be, it is not constitutionally mandated in a case such as this. (Cites omitted). The basis for the trial judge's mistrial order is adequately disclosed by the record, which includes the extensive argument of counsel prior to the judge's ruling.[10]

The fact that the district court did not set forth formally how he chose to reconcile the conflicting statements by the parties is irrelevant. What is relevant is that the conflicting statements of counsel with respect to how the potential class was being approached clearly manifested sufficient danger of abuse of the class action process to permit—indeed to require—the district court to act. It was the trial judge, not the appellate court, who had the opportunity to evaluate the degree to

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Steinheiser, Inc. v. Henry, 280 F.2d 79, 84 (6th Cir. 1960). Even in first amendment cases, orders limiting communications may be made with "substantial support in the record" *In Re Primus, supra* at 434, or on a "specific record" *Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir. 1977), *cert. denied*, 434 U.S. 985 (1977).

10. Federal courts have followed this rule in federal cases. *United States v. Grasso*, 600 F.2d 342, 343 (2d Cir. 1979) *rev'd on other grounds*, 629 F.2d 805 (2d Cir. 1980); *United States v. MacQueen*, 596 F.2d 76, 83 (2d Cir. 1979).

which the rights of the potential class members would be placed in jeopardy by the continued unsupervised communications of the parties and their counsel. In *Arizona v. Washington,* 434 U.S. 497 (1978), the Court found that "the overriding interest in the evenhanded administration of justice" required "the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *Id.* at 511. So too, here, the appellate court and this Court owe "the highest degree of respect to the trial judge's evaluation," *ibid,* that the situation before him could seriously mislead members of the class who were his ultimate responsibility. "He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the *tone* of argument as it was delivered. . . . In short, he is far more 'conversant with the factors relevant to the determination than any reviewing court can possibly be.' *See Wade v. Hunter,* 336 U.S. 684, 687 (1949)." *Id.* at 514. While, as Respondents point out (R. Br. 46), appellate counsel cannot support restrictions on fundamental rights by conjecture, neither ought they, nor appellate courts, attempt to second-guess the trial judge whose familiarity with the case and with the parties and their counsel led him to conclude that he could not adquately protect the potential class members if he were to assume a more passive role.

Consequently, while it is indeed true that restrictions on first amendment rights should be "closely drawn to avoid unnecessary abridgement of associated freedoms," *Buckley v. Valeo,* 429 U.S. 1, 25 (1976), a restriction, when necessary, cannot be so narrowly drawn as to render it impotent. Here, the order describes the forbidden con-

duct as precisely as the litigation situation permits. By its very terms, it exempts all communications where the speaker asserts "a constitutional right to communicate with any member of the class without prior restraint." (J.A. 125).[11] Moreover, it is well undestood that monitoring orders entered pursuant to the *Manual for Complex Litigation* are subject to frequent modification since the trial judge has the continuing obligation to tailor the terms of the order to the unfolding litigation situation. Indeed the *Manual* itself states:

> Promptly after the entry of the recommended order, or the applicable date of the local rule in a case, and at all times thereafter, the court should, upon request, schedule a hearing at which time application for relaxation of the order and proposed communications with class members may be presented to the court. Because the recommended rule and order are designed to prevent only potential abuse of the class action and are not meant to thwart normal and ethically proper processing of a case, the court should freely permit proposed communications which will not constitute abuse of the class action. In many cases, the class members will have knowledge of facts relevant to the litigation and to require a party to develop the case without contact with such witnesses may well constitute a denial of due process.

Manual, § 1.41.

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11. Respondents' characterization of the order as a "gag order" (R. Br. 27), "barring communications" (R. Br. 30) and blanket prohibitions (R. Br. 73) is incorrect. The order allowed Respondents' attorneys to communicate with: (1) their clients and potential clients who sought their advice (J.A. 125); (2) the 34 retained clients of Ms. Morrison (J.A. 125); (3) the over 450 individuals (J.A. 23) who had signed releases prior to suit (J.A. 124); (4) all potential class members where a prior restraint was asserted (J.A. 125); and (5) all individuals where prior court approval has been given. (J.A. 124).

Consequently, the parade of horribles which Respondents contend will necessarily follow from this order (R. Br. 88 *et seq.*) are purely conjectural.[12] In the course of the litigation, the trial court would be expected to modify his order in order to permit both parties to prepare adequately for trial and protect their attorneys' work product.

Moreover, contrary to the suggestion of Respondents, the order of the district court was not "directed at particular groups or viewpoints," *Broadrick v. Oklahoma,* 413 U.S. 601, 616 (1973), but sought to regulate, "in an even-handed and neutral manner" *ibid.,* the conduct of *all* those presently engaged in litigation before the court.[13] Thus, presented with assurances by government officials[14]

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12. Respondents contend that their discovery rights, both individual and class, were impaired by the order (R. Br. 2, 42, 89-91), but Respondents neither attempted any discovery nor demonstrated that the order in any way prevented them from pursuing discovery through normal channels such as depositions or interrogatories.

13. Respondents incorrectly contend company officials were free to discuss the case with their black employees (R. Br. 81, 89) and could have intimidated witnesses and potential class members. (R. Br. 90). The record reflects quite the contrary. Gulf voluntarily suspended all conciliation discussions with potential class members as soon as suit was filed (J.A. 43), sought a monitoring order to be applied to both sides of the litigation (J.A. 21, 46, 92, 124) and then abided by the terms of that order by allowing the clerk of court to disseminate all further notice to potential class members (J.A. 128). There is neither record support nor allegations that Gulf improperly contacted potential class members either before or after entry of the monitoring orders.

14. The Government apparently has abandoned the sworn statements of the District Director of the EEOC (J.A. 71) and the Regional Manager of the OFCCP (J.A. 76) that the conciliation agreement was a "fair and reasonable" settlement of all charges of discrimination and upon its fulfillment would put Gulf's Port Arthur Refinery in compliance with Title VII and Executive Order 11246. (See Gov. Br. 1, 2, 4, 6, 20 n.15). The Government now contends the May 1, 1976, letter (See Gov. Br. App. 1a—a letter not in the record of this case) did not properly inform covered employees of

(J.A. 71-76) that the conciliation agreement was the product of an "extremely thorough and comprehensive" investigation (J.A. 73), was based on an examination of "all relevant documents and business records of Gulf" (J.A. 73) as well as "on-site investigations" (J.A. 73) and "numerous meetings with Gulf's executives" (J.A. 73) and thus "a fair and reasonable settlement" (J.A. 78), the district court modified its order to permit members of the potential class to be presented with the conciliation agreement. At the same time, however, he required that such contact be undertaken under the supervision of the court and that members of the potential class be informed, simultaneously, of the pendency of the present action. (J.A. 128-129).

This evenhanded approach is not impeached by the district court's subsequent denial of Respondents' motion to modify further its order and to permit the Respondents to distribute a flyer. (R. Br. Appx. B). Not only was this

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the terms of that settlement (Gov. Br. 4, 20). The Government incorrectly says the letter was sent to potential class members (Gov. Br. 20). This was impossible since at the time the letter was sent, no suit had been filed and it went only to those people who received conciliation benefits—a much smaller group than Respondents' later alleged class. Ironically, the letter now so heavily criticized by the United States and the EEOC in their brief was required by the conciliation agreement (J.A. 31), approved by the EEOC (J.A. 31), and signed by the EEOC (J.A. 31, Gov. Br. App. 2a). Contrary to the Government's and Respondents' contention that the letter was not informative (Gov. Br. 20, Br. 4, 20), it explained the backpay award was based on seniority (Gov. Br. App. 1a) and it stated that questions about the conciliation agreement would be answered not by Gulf, but by the EEOC. (Gov. Br. App. 2a).

In light of the Government's virtual abandonment of the position it took in the trial court, employers would be better served by always litigating Title VII issues rather than engaging in conciliation since the Government has, by its present stand, seriously undermined the conciliation proccess.

material in a sense duplicative with the earlier communication of the district court (J.A. 128-129), it was also a good example of the sort of material which justifies a monitoring order such as the one entered in this case. As noted by Gulf in its motion in opposition, (J.A. 139-145), the language in the proposed leaflet contained several serious ambiguities which could have precipitated extraordinary confusion among members of the potential class (J.A. 140-143), and it did not comply with the terms of the order for submitting statements to the district court (J.A. 124). The plaintiffs' proposed notice is also a rather graphic example of why the district court could not have been expected to employ a "less drastic" alternative, *see generally Shelton v. Tucker,* 364 U.S. 479, 488 (1960), to serve their concerns about the fair and orderly administration of justice. It is indeed difficult to perceive how erroneous information disseminated to such a large and geographically dispersed group as "the black workers of Gulf" could have been corrected without imposing incalculable hardships, both financial and human, on a significant number of the members of the potential class. Moreover, in a very real sense, the monitoring order entered in this case, as suggested by the *Manual for Complex Litigation,* is itself a less restrictive alternative since it exempts from its scope all privileged speech and is entered on the understanding that it will be continually modified as the litigation progresses to meet the needs of the parties.[15]

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15. Rather than supporting the use of a monitoring order to control misrepresentations, both the Government (Gov. Br. 31) and Respondents (R. Br. 29) suggest that misrepresentations can be controlled by disciplinary action against the lawyers and remedial notice to the affected potential class members. This suggestion ignores the purpose of the order which is to prevent misrepresentations rather

Finally, by failing to suggest any test to this Court under which a monitoring order could be entered, both the Respondents and the Government seem to imply that the district court is without discretion, or has very limited discretion, when first amendment rights are collaterally affected, to enter the *Manual's* suggested order. If this is the case, then parties and their attorneys will be cast against each other in an atmosphere much like a political campaign to solicit the favor of potential class members while the district court is forced to stand helplessly by.

IV. Conclusion

The decision in this case will have profound impact on the ability of the courts to ensure that their proceedings are conducted in a fair and orderly manner. Petitioners urge the Court to ratify the important fiduciary duty owed to the judicial process by those who invoke its protection

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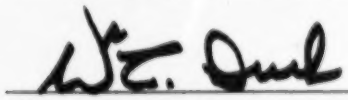
than attempting to remedy the harm done after the misrepresentations have been made. Furthermore, the monitoring order serves to detect misrepresentations at the earliest possible time so that the district court will know when remedial action is necessary. Without the monitoring order, the district court may not discover the harmful conduct until it is too late to employ remedial action.

and to recognize the special fiduciary obligation of litigating counsel to the court before which they stand.

Respectfully submitted,



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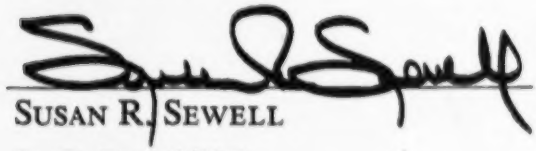

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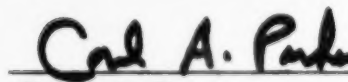

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I hereby certify that on the 23rd day of March, 1981, a true and correct copy of the foregoing Petitioners' Reply Brief was deposited in the United States Post Office with first class postage prepaid and properly addressed to the following parties to this action and others required to be served:

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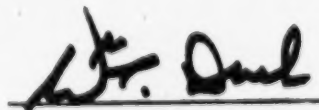
I also certify that all parties required to be served have been served.



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